

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2520

Cir. Ct. No. 2009CV499

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

HOFFER PROPERTIES, LLC,

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN, DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Hoffer Properties, LLC (“Hoffer”) appeals a judgment of the circuit court granting Hoffer’s motion to voluntarily dismiss this condemnation review action after the court entered partial summary judgment in favor of the Department of Transportation (DOT). Hoffer argues on appeal that,

whenever DOT eliminates a property's direct access to a controlled-access highway, DOT must pay reasonable compensation to the property owner if a jury determines that the replacement access is not reasonable. Hoffer also argues that DOT lacks authority to deny a driveway permit application made by a property owner abutting a controlled-access highway solely on the basis of the owner's intended use of the property. For the reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

¶2 This is an eminent domain case involving a taking of .72 acres of property from Hoffer by DOT for a state highway project. There is no dispute that the highway project involved a controlled-access highway and, therefore, was governed by WIS. STAT. § 84.25 (2007-08). The result of the taking was that Hoffer's direct driveway access to State Highway 19 was replaced by alternate access. The alternate access was accomplished by the westward extension of an existing public road, Frohling Lane, to reach the Hoffer property.

¶3 Hoffer appealed to the circuit court on the issue of compensation. DOT moved for partial summary judgment, arguing that the alternate access from Hoffer's property to Highway 19 was reasonable as a matter of law. The circuit court granted summary judgment on that issue. Hoffer filed motions in limine and moved to dismiss the action, reserving the right to appeal. The circuit court denied the motions in limine, but granted the motion to dismiss the action. Hoffer now appeals.

DISCUSSION

¶4 Hoffer argues on appeal that it was denied reasonable access to Highway 19 when DOT cut off its direct access to the highway in exercising its power of eminent domain. Hoffer argues that the question of whether the alternate access was reasonable should have gone to the jury. DOT counters that it provided alternate access to the subject property and that, therefore, the change in access was not compensable as a matter of law under *Surety Savings & Loan Ass’n v. State*, 54 Wis. 2d 438, 443, 195 N.W.2d 464 (1972). We agree with DOT’s position.

¶5 In *Surety Savings*, the Wisconsin Supreme Court held that “there is no compensable taking when direct access to a controlled-access highway is denied, where other access is given or otherwise exists.” *Id.* In that case, DOT terminated the property owners’ direct access to a controlled-access highway and replaced it with access to a frontage road. *Id.* at 441-42. The property owners argued that they should be compensated for the termination of their direct access, but the court rejected their argument, concluding that they did not have a right to be compensated “merely because access to their property has been made more circuitous.” *Id.* at 446.

¶6 Hoffer cites *National Auto Truckstops, Inc. v. DOT*, 2003 WI 95, 263 Wis. 2d 649, 665 N.W.2d 198, to support its position that compensation should be available for Hoffer’s loss of direct access to Highway 19. In *National Auto*, the court held that DOT’s elimination of a property owner’s direct access to an abutting highway without compensation was not a proper exercise of police power. *See id.*, ¶¶4-7, 14, 16. The case was remanded so that a jury could determine whether or not the alternate access was reasonable. *Id.*, ¶28. However,

National Auto is distinguishable from the present case because the highway project in *National Auto* was not a controlled-access highway. See *id.*, ¶14.

¶7 *Surety Savings* is determinative of the outcome here because, like the instant case, it involved a controlled-access highway. See *Surety Savings*, 54 Wis. 2d at 440, 443. Following the holding in *Surety Savings*, we conclude that Hoffer is not entitled to compensation for the loss of its direct access to Highway 19. See *id.* at 446. We reject Hoffer’s argument that the question of whether the alternate access was reasonable was required to be decided by a jury, because reasonableness is not the correct legal standard to apply. Under *Surety Savings*, the inquiry is merely whether alternate access was provided. See *id.* at 444-45. The right of access “involves only the right to enter and leave the property without being forced to trespass across the land of another” and does not include any right to have access “at any particular point on the boundary lines of the property.” *Id.* at 444. Since it is undisputed that alternate access to Hoffer’s property was provided, the circuit court properly granted summary judgment on that issue.

¶8 We turn, then, to the issue of whether DOT has the authority to deny a driveway permit application solely on the basis of the owner’s intended use of the property. We question whether this issue is properly before us since it was not a part of the partial summary judgment proceedings. Even if we assume that the driveway permit issue is properly before us, we conclude that Hoffer forfeited the issue when Hoffer failed to address the driveway permit argument and, instead, moved to voluntarily dismiss the action in circuit court with prejudice in order to pursue this appeal.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2011-12).

